Filed 3/29/10 P. v. Castro CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. REINAL CASTRO, JR., Defendant and Appellant.	C061603 (Super. Ct. No. 72331)

Defendant Reinal Castro, Jr., pled no contest to two counts of transportation of methamphetamine and admitted on-bail and prior drug conviction enhancements in exchange for a stipulated sentence of nine years and dismissal of all other counts.

Prior to sentencing, defendant requested a day pass to visit his father, whom defendant claimed was dying. The court denied the request, but stated that it would delay defendant's transportation to state prison and order the jail facility "to make every possible available opportunity" for visits by the father. Defendant's retained counsel, Lawrence Cobb, then informed the court that defendant wished to withdraw his plea.

The court appointed counsel J. Toney to evaluate the motion and continued the sentencing hearing.

Attorney Toney filed a motion to withdraw the plea based upon defendant's declaration that he was induced into entering the plea by attorney Cobb's representation that he would be given a "temporary (compassionate) release" to see his father, that attorney Cobb had failed both to subpoena an exonerating witness (a codefendant) and to give him adequate time to consider the plea. Following a hearing at which defendant was represented by both attorneys Cobb and Toney, and at which attorney Cobb testified contrary to defendant's declaration, the court denied the motion and sentenced defendant in accordance with the plea agreement.

Defendant twice filed notices of appeal challenging the validity of his plea and each time the court refused his request for a certificate of probable cause. Defendant filed a third notice of appeal, this time asserting that the plea was based on matters occurring after the plea and did not challenge the validity of the plea. Consequently, the appeal became operative with the record being prepared and counsel being appointed.

Defendant's primary claim on this appeal is that the court's appointment of attorney Toney while he was still represented by attorney Cobb created a conflict of interest in his representation, thereby denying him his right to conflict-free counsel in violation of his Sixth Amendment right to counsel. He argues that because this claim "does not attack the validity of the plea or the denial of his motion to withdraw the

plea, but rather challenges the lack of conflict-free counsel in critical postplea proceedings, a certificate of probable cause is not required." We disagree.

Defendant's other claim on appeal relates to the calculation of his presentence custody credits. We conclude the trial court erred because it did not determine defendant's custody credits or ensure that the total number of days to be credited was contained in the abstract of judgment. Accordingly, we will remand for the court to do both of these things.

DISCUSSION

I

Denial Of Conflict-Free Counsel

Penal Code section 1237.5 prohibits a defendant from taking an appeal from a plea of guilty or no contest which challenges the validity of his plea unless he obtains a certificate of probable cause for the appeal from the trial court.[1] A motion to withdraw a plea based on ineffective assistance of counsel, whether made before or after the plea, requires a certificate of

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[1] In full, Penal Code section 1237.5 states: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

probable cause. (*People v. Stubbs* (1998) 61 Cal.App.4th 243, 244-245; *People v. Ribero* (1971) 4 Cal.3d 55, 63 ["In determining the applicability of section 1237.5, the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made"].) "[C]onflicts of interest are a category of ineffective assistance of counsel claims . . . ." (*People v. Doolin* (2009) 45 Cal.4th 390, 417.)

People v. Earp (2008) 160 Cal.App.4th 1223, *People v. Osario* (1987) 194 Cal.App.3d 183, and *People v. Cotton* (1991) 230 Cal.App.3d 1072, which defendant relies upon in support of his assertion that no certificate of probable cause is required in these circumstances, are of no aid to him. Unlike the instant case, in none of the cited cases was a motion filed to withdraw the defendant's plea, let alone, also as here, having the court rule on such a motion. Indeed, each case observes that if a defendant actually challenges the validity of his plea by means of a motion to withdrawn the plea, he must obtain a certificate of probable cause. (See *Earp*, at p. 1228 ["Defendant concedes that if his motion to withdraw had been heard and denied, he would have been required to obtain a certificate of probable cause"]; *Osario*, at p. 187 [If motion to withdraw plea had been filed and denied, certificate would have been required because plea itself would have been placed in issue]; *Cotton*, at p. 1079 [noting that "'"[i]f a defendant challenges the validity of his plea by way of a motion to withdraw the plea, he cannot avoid the requirement of [Penal

Code] section 1237.5 by labeling the denial of the motion as an error in a proceeding subsequent to the plea"'"].)[2]

In sum, because the substance of defendant's conflict of counsel complaint is in essence a claim of ineffective assistance of counsel with respect to his motion to withdraw his plea, defendant is required to obtain a certificate of probable cause for consideration of that issue by this court, and his failure to have done so precludes us from considering this issue on appeal. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1099.)

II

Presentence Custody Credits

Defendant's case was originally set for sentencing on December 18, 2008. The probation department submitted a probation report for the hearing showing that defendant was entitled to 392 days of actual custody credits and 196 days of conduct credits pursuant to Penal Code section 4019 as of the date of the hearing.

When defendant indicated at the hearing that he wanted to withdraw his plea, the sentencing hearing was continued. Sentencing ultimately occurred on February 9, 2009. At that

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[2] O*sario* was recently disapproved in *People v. Johnson* (2009) 47 Cal.4th 668 at page 681: "To the extent that *Osorio* relied upon the circumstance that the defendant's claim was 'based upon activities occurring after the plea' (*Osario, supra,* 194 Cal.App.4th at p. 187), that case is inconsistent with *Ribero*, in which we concluded that the determinative factor [for application of Penal Code section 1237.5] is 'the substance of the error being challenged, not the time at which the hearing was conducted.' (*Ribero, supra,* 4 Cal.3d at p. 63.)"

time, the trial court stated, "I don't have his current credits, so I'm going to ask probation to provide within 30 days of today's date a memorandum giving up-to-date credits which will go to counsel. If there are any corrections, let me know right away. If not, we'll send that on to the Department [of Corrections and Rehabilitation]."

On February 10, 2009, the day after the sentencing hearing, the abstract of judgment was filed. Under item No. 14, "CREDIT FOR TIME SERVED," the abstract reads, "SEE#11." Under item No. 11, "Other orders," the abstract reads (in pertinent part), "PO TO PREPARE MEMO W/CREDITS TIME SERVED FILE BY 3-23-09 TO BE SENT TO CDC."

On February 16, 2009, the probation department sent a memo to the court with the "update[d] credit for time served," showing defendant was entitled to 445 days of actual custody credits and 222 days of conduct credits pursuant to Penal Code section 4019, for a total of 667 days of credits as of February 9, 2009. The memo was filed the next day and apparently served on the legal process unit of the Department of Corrections and Rehabilitation on February 18 along with the abstract of judgment.

On January 25, 2010, legislation amending Penal Code section 4019 regarding the accrual of presentence conduct credits went into effect. (Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Under that new law, an inmate may earn two days of conduct credits for every two days of actual custody, instead of earning two days of conduct credits for every four days of

actual custody as under the prior version of Penal Code section 4019.

After the new law took effect, defendant asked to file a supplemental brief to address the applicability of this new conduct credit calculation. We have since issued a general order (miscellaneous order No. 2010-002) that deems the issue of the retroactive application of the amendment to Penal Code section 4019 to have been raised without further briefing.

Upon consideration of this issue, we conclude the Legislature intended its amendment to Penal Code section 4019 to apply to a case such as this, which was not yet final on the date the new law took effect. The obvious intent of the Legislature in amending Penal Code section 4019 was to reduce the time in prison for eligible defendants, and thus it must be presumed the legislation was intended to apply retroactively (*In re Estrada* (1965) 63 Cal.2d 740, 748), unless a contrary intent is indicated. We have found no contrary intent. Accordingly, defendant is entitled to the additional conduct credits provided by amended Penal Code section 4019.

We note here, however, an error on the issue of custody credits separate from the amount of credits involved. Penal Code section 2900.5 provides generally for the application of presentence custody, "including days credited to the period of confinement pursuant to Section 4019." (Pen. Code, § 2900.5, subd. (a).) Under subdivision (d) of Penal Code section 2900.5, "It shall be the duty of the court imposing the sentence to determine the date or dates of any admission to, and release

from, custody prior to sentencing and the total number of days to be credited pursuant to this section. The total number of days to be credited shall be contained in the abstract of judgment provided for in Section 1213."

Neither of these requirements was met in this case. First, the trial court did not "determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to . . . [Penal Code] section" 2900.5. Instead, the court delegated its responsibility to determine the credits to the probation department, directing the department "to provide . . . a memorandum giving up-to-date credits which will go to counsel," and then, if counsel did not disagree, "to the Department [of Corrections and Rehabilitation]." Second, the abstract of judgment did not "contain" "[t]he total number of days to be credited." Instead, that document simply referred to the "memo" that was to follow.

There does not appear to be any dispute that the probation department properly calculated the number of credits (albeit based on the version of Penal Code section 4019 that was then in effect). Moreover, it *appears* the probation department's memo accompanied the abstract of judgment when the court sent the latter document to the Department of Corrections and Rehabilitation. Nevertheless, Penal Code section 2900.5 imposes the obligation *on the trial court* to determine the total number of days to be credited and requires the trial court to include

that number *in* the abstract of judgment, not in some accompanying document.

Here, it appears defendant is entitled to 445 days of actual custody credits and 445 days of conduct credits pursuant to the amended version of Penal Code section 4019, for a total of 890 days of credits. Under Penal Code section 2900.5, however, this is a determination for the trial court to make in the first instance, and because the abstract of judgment needs to be amended in any event, we remand the case to the trial court to make the required determination and to amend the abstract accordingly.

DISPOSITION

The judgment is affirmed, except that the case is remanded to the trial court with directions: (1) to determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to Penal Code section 2900.5 (consistent with this opinion); (2) to amend the abstract of judgment to reflect the total number of days to be credited; and (3) to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

SCOTLAND, P. J.

CANTIL-SAKAUYE, J.